In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1278

CLARK COUNTY, NEVADA,
Petitioner,

vs.

ARBY W. ALPER AND RUTH ALPER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN R. WHIPPLE
Deputy District Attorney
Clark County Courthouse
200 East Carson Avenue
Las Vegas, Nevada 89101
Counsel for Petitioner

GEORGE E. HOLT
District Attorney
Clark County Courthouse
Of Counsel

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3080

TABLE OF CONTENTS

CITATIONS

CONSTITUTIONAL PROVISIONS

STATE STATUTE

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. .....

CLARK COUNTY, NEVADA,
Petitioner,
vs.
ARBY W. ALPER AND RUTH ALPER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

TO the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner CLARK COUNTY, NEVADA respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Nevada entered in this proceeding on November 17, 1977 under docket number 8412 and preliminarily reported at 93 Nev. Advance Opinion 195.

OPINIONS BELOW

The order and judgment of the Trial Court, Case No. A77807 entered and filed on June 5, 1975 appears at Appendix A.

The judgment and opinion of the Supreme Court of Nevada appears at Appendix B.

The Order of the Supreme Court of Nevada denying rehearing entered December 15, 1977 appears at Appendix C.

JURISDICTION

The Supreme Court of the State of Nevada entered judgment on November 17, 1977. Clark County petitioned that Court for rehearing on December 2, 1977 and on December 15, 1977 that timely petition for rehearing was denied.

This petition for certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

(1) Whether a political subdivision (Clark County), even though not generally a *person* under Amendment XIV of the United States Constitution, which is nevertheless an entity capable of suing and being sued, is entitled to procedural due process as a litigant in defending its property rights in an action brought by a private party?

(2) Whether the Supreme Court of Nevada abused the scope of its appellate jurisdiction in making findings on crucial fact-law issues not before the Court on appeal, where there has been no trial on the merits; precluding Clark County from presenting its evidence and raising important defenses; and where such issues were not appealable nor properly before the Court on appeal; thereby

denying Clark County its "day in Court", in violation of its right of procedural due process under Amendment V and Amendment XIV of the Constitution of the United States?

CONSTITUTIONAL PROVISIONS

Constitutional provisions involved are rights of due process under Amendments V and XIV of the United States Constitution.

STATEMENT OF THE CASE

This is an action in inverse condemnation brought by Arby and Ruth Alper (both referred to herein as "Alper"), versus Clark County, Nevada in the Eighth Judicial District Court of the State of Nevada in Las Vegas.

At issue is a 50′ x 1000′ parcel of land which has been an integral part of a major thoroughfare, namely Flamingo Road, since mid-1967. Title to the property is and has been in Alper.

Alper owned undeveloped real property at the intersection of Las Vegas Boulevard South and Flamingo Road measuring approximately 255′ x 1000′. (Plaintiff's Exhibit 1-A) In November of 1966 Alper leased this property to Bonanza No. 1 for a period ending May 31, 1972. The lease gave the lessee an option to extend the term for an additional 50 years. (Plaintiff's Exhibit 3) Construction of the Bonanza Hotel and Casino was planned using a part of this property on that busy corner. Prior to the lease, Clark County made known its intention to widen Flamingo Road and requested Alper to dedicate the northern 50′ of the property to enable it to do so. Alper refused. (Plaintiff's Exhibits 2, 2-A, 2-B; Alper's deposition p. 135)

In February of 1967, at a regular meeting of the Clark County Commissioners, the Commission considered a request by Bonanza No. 1 for a zone variance for construction of their hotel. The Commissioners conditioned the variance on the obtaining of a public road easement across the northern 50′ of the Alper property which was agreed to by Bonanza No. 1. (Plaintiff's Exhibit 5)

On March 21, 1967, while the lease was in effect, but without the 50 year option having been exercised, Bonanza No. 1, lessee, executed such easement to Clark County for a period of 52 years, to allow the construction of a public road. The easement was recorded on March 22, 1967 and the road was constructed and completed shortly thereafter. (Plaintiff's Exhibits 7-A, 10-A, 10-B)

After Alper expressed concern of a possible loss of title of the parcel by prescription or adverse possession, Clark County's Deputy District Attorney wrote to Alper a letter dated June 19, 1968 (See Appendix G), stating the County would not contend that because of continued use of the parcel as a street that any prescriptive right could be acquired. The adverse possession statute in Nevada is only a 5 year statute.

Bonanza No. 1 filed a proceeding in bankruptcy. On January 16, 1969, the lease between Alper and Bonanza No. 1 was cancelled by mutual consent of the lessor and lessee as a part of a transaction by which Alper sold the remaining property to Tracy Investment Company. Subsequent purchases and development resulted in the location of the MGM Grand Hotel, in part, on this site.

On July 31, 1972, Alper, for the first time, became a party as plaintiff to this litigation. The filing of an Amended and Supplemental Complaint made them plaintiffs in this action against Clark County.

After a series of motions and pre-trial conferences, but no trial, the Eighth Judicial District Court dismissed Alper's complaint against Clark County on the basis that Alper had not filed a claim as required under Nevada Revised Statutes section 244.245 (the claims statute, see Appendix H). The Court dismissed the complaint for want of jurisdiction as a result of Alper's failure to comply with that section holding that the filing of a claim was a condition precedent to maintaining this action. (See Appendix A, Appendix F herein) Alper appealed the Judgment of the Eighth Judicial District Court to the Supreme Court of the State of Nevada. (See Appendix E)

On November 17, 1977, the Supreme Court of the State of Nevada rendered judgment on that appeal and reversed the judgment of the Eighth Judicial District Court, remanding the case for trial on its merits. (See Appendix B)

The Nevada Supreme Court held that the claims statute was unconstitutional as it applies to actions in inverse condemnation.

Unfortunately, the Nevada Supreme Court went on to make apparent findings of fact-law issues not before the Court on appeal.

For that reason, Clark County filed a petition for rehearing on December 2, 1977, alleging it had been denied its constitutional right of procedural due process by the findings of the Supreme Court on fact-law issues which were not before the Court on appeal, and had been denied "its day in Court". (See Appendix D)

The Supreme Court of the State of Nevada denied that petition for rehearing without comment on December 15, 1977. (See Appendix C)

REASONS FOR GRANTING THE WRIT

I

The Decision Below Gives Rise to a Vital Unsettled Question; Namely, Whether a Local Political Subdivision, Not Generally a "Person" in the Context of the Due Process Clause Under Amendment XIV, Is Nevertheless Entitled to Procedural Due Process As a Party-Litigant.

It is undisputed that a local political subdivision is generally held not to be a "person" for purposes of due process under and through Amendment XIV of the United States Constitution. The question presented for review, however, does not relate to substantive due process rights. Since the protective veil of sovereign immunity has been partially lifted and such political entities are now capable, by legislative fiat, of being sued, the doctrine of fair play in litigation and the fundamental right to have one's "day in Court", requires determination that such entities are entitled to the protection of procedural due process in defending themselves against the actions of private parties.

Local governments must do business with the public in all the ways of a private corporation, but also face the seemingly insatiable demands for services of an expanded populace. They must seek to do business and meet such demands under strict limitations of statutory and constitutional restrictions with limited, often ill-defined powers. Entities must function through the operations of a number of agencies, departments and officers, often headed by independent elected officials. Seldom does one public executive or executive body have the control, access to information, and well defined authority and power to

deal effectively with the variety of business, social and economic problems in the same manner as private corporate enterprise. The functions and processes of government are inherently different. These distinctions have been the basis, in the past, for legitimate legislative and constitutional protections in the form of sovereign immunity.

Courts and legislatures have been fit to abrogate the doctrine of such immunity in many situations. For the most part, a local government entity has been given the legislative power to sue and the responsibility of being sued by private individuals.

Because of its unique structure a public entity is particularly vulnerable to certain kinds of litigation arising in part out of the demands of their public and through the limitations on its power to satisfy public need.

The result is an increasing proliferation of legal actions against such local governments.

There is a tendency for legislatures who have created such entities and even for the courts of the state, upon occasion, to approach the legal problems of such local governments with a highly paternalistic attitude. This can take the form of an insidious encroachment upon the procedural fair play doctrines of litigation. It is not suggested that such encroachments are wilful or even recognized by state institutions. It is, however, perhaps easier for the courts to tend to an abuse of jurisdiction when the litigants may be looked upon somewhat as a child or a stepchild of the state. These tendencies may be enhanced by an acceptance of the assumption that such public entities are not entitled to due process under the United States Constitution.

Nevertheless, once a county or city has the power to sue or be sued as a party litigant, it should be entitled

to the same fundamental protection of any litigant as embodied in the concepts of fair play and should be entitled to its day in court. To deny such entities procedural due process could lead potentially to the obvious horrible result of having two classes of litigants. In the oft-quoted words of Daniel Webster, all litigants should be entitled to proceed under "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." (From argument in *Dartmouth College* v. *Woodward*, 4 L.Ed. 627).

The question of whether or not such entities are clearly entitled to such procedural due process under the United States Constitution appears not to have been decided. There has been a scattering of cases where courts have held that such due process is essential. See *School District No. 23* v. *Planning Committee*, 361 P.2d 360 (Colo. 1961); *Nelson* v. *Garland*, 187 A. 316 (Pa. 1936); *Mensik* v. *Smith*, 166 N.E.2d 265 (Ill. 1960); *Township of Middletown* v. *Institution District*, 293 A.2d 885 (Pa. 1972); and *Township of River Vale* v. *Town of Orangetown*, 403 F.2d 684 (Cir. 2, 1968).

American appellate courts are now faced with the review of an ever-increasing number of decisions involving actions against local governmental entities. It is essential that such public entities be assured of the right to raise all their defenses, present their evidence and have their day in court. The resolution of this issue is of increasing national importance.

II

The Decision Below Is a Classic Case of Abuse of Appellate Jurisdiction Which Effectively Denies Clark County Its Day in Court on Crucial Issues of Fact and Precludes It From Raising Legitimate Defenses in a Trial on the Merits.

The denial of a litigant of its day in court and of the opportunity to raise all of its defenses is so fundamental that it cries out to this Honorable Court for relief.

After only pre-trial argument and briefing, the Trial Court reached certain conclusions resulting in a dismissal of plaintiff's complaint for want of jurisdiction. (See Appendix A herein)

Although under these circumstances no conclusions of law or findings of fact were required, the Trial Court constrained to record its pre-trial findings. It has been consistently held that a dismissal for want of jurisdiction precludes the court from making a determination on the merits. Having made a finding of failure of jurisdiction, any findings of fact and conclusions of law relating to the merits of the action were of no force and effect.

The only appealable issue was the order and judgment of the Trial Court (Appendix A), which dismissed Plaintiff's complaint for want of jurisdiction. Interlocutory findings of fact and conclusions of law were not in any sense appealable by Clark County, even on cross-appeal.

The Supreme Court of Nevada, in reversing the Trial Court's judgment of failure of jurisdiction and remanding for trial on the merits, did not limit itself to that single appealable issue.

The Supreme Court of the State of Nevada went further, in an abuse of its appellate jurisdiction, to make comments, statements and conclusions (some seeming to confirm and some overruling conclusions of the Trial Court), which have the effect of precluding Clark County from raising certain essential defenses on remand in a trial on the merits and indeed have spoken so as to make certain conclusions to be the *law of the case*. This leaves Clark County with little to try on remand except the issue of valuation of the property in question.

Specifically, the Trial Court, in order to determine that the claims statute was a condition precedent to suit and to rule on the effect of the failure to file such a claim would and did find it necessary to conclude that a "taking," occurred on a certain date. Such an interlocutory finding is not unusual in such circumstances; for example, where a court is seeking to rule on a motion for summary judgment where the court may take plaintiff's allegations in their most favorable light before ruling on a defense motion.

The Supreme Court of Nevada, in commenting, seems to tend to confirm that conclusion and the date of taking.

More importantly, the Supreme Court of the State of Nevada chose to decide the issue of whether or not Clark County might raise as a defense the various statutes of limitation, other than and aside from, the so-called claims statute.

On page 5 of its opinion (Appendix B herein), the Supreme Court of Nevada quotes partially from Clark County's letter of June 19, 1968, and reaches a conclusion that there has been an "avoidance" of the statutes of limitation.

The position of Clark County is clear that it is using the parcel of property in question under a grant in easement. Under those circumstances there could be no taking. Clark County should be entitled in a trial on the merits to present its evidence as to the manner and circumstances under which it entered into the property under a grant in easement, the effect of that easement and the effect of the voluntary termination of the lease on the easement. Even if a conclusion of a "taking" should be reached in a trial on the merits, Clark County should have the *opportunity to raise all of its defenses*, including the statutes of limitation in that trial.

The Trial Court, in its interlocutory findings, found that Clark County's letter of June 19, 1968, did not waive any of its defenses, saying in its statement from the bench,

> "I don't view the letter of Mr. Bartley as an intention to waive or as in any way to give the impression to the Alpers that the County was waiving its right under the non-claims statute.
>
> "The Alpers were not led into a sense of false security. The Bartley letter was intended to do exactly that which it said it was doing.
>
> "They were waiving any claim for prescriptive easement. It has nothing to do with whether or not the Alpers have a claim for inverse condemnation, and whether they are going to assert that claim they have to file a notice of claim with the County in the period limited by 244.245." (See Appendix F)

Mr. Justice Holmes, speaking for the Court in *Frank v. Mangum*, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 said,

> "Whatever disagreement there may be as to the scope of the phrase 'due process law,' there can be no doubt

that it embraces the fundamental conception of a fair trial, with opportunity to be heard."

To deny Clark County the opportunity to be heard on all of the facts and circumstances giving rise to the letter and bearing upon its interpretation and to deny Clark County the right to present its evidence of all the facts and circumstances surrounding its entering into the property under a grant in easement is to effectively deny Clark County its day in court.

The Supreme Court of Nevada, in abusing its appellate jurisdiction, has sought to decide issues of fact and law which effectively preclude Clark County of trying these vital issues and raising its vital defenses. Such an abuse of jurisdiction has effectively precluded Clark County from trying its case and is a violation of procedural due process under Amendment V and Amendment XIV of the Constitution of the United States.

Although it is understood that appellate courts, in the interest of judicial economy, have the discretion to speak to collateral issues of law and review the record on certain issues of fact where all the evidence is before the court on appeal, such discretion provides no excuse for such an abuse of jurisdiction where there has not been a trial or an evidentiary hearing on fundamental issues and defenses.

When a state has made a political subdivision subject to suit by private parties, that entity should be entitled to the full panoply of procedural due process rights of any litigant.

A grant of certiorari to review the decision below is justified in that it would enable the United States Supreme Court to resolve important constitutional questions involving broad practical consequences in litigation generally; especially litigation involving local political subdivisions as defendants against private parties.

III

A Substantial Federal Question Has Been Preserved and Although Further Proceedings Are to Be Had in the Trial Court, There Has Been a Final Adjudication of the Question Presented for Review.

(A) The questions presented for review concern a violation of fundamental rights of procedural due process under Amendment V and Amendment XIV. Those violations did not appear until the rendering of judgment and opinion by the Supreme Court of the State of Nevada. Clark County raised the issue by a timely petition for rehearing to that Court. That petition was denied. No other remedy was available.

(B) Although the Supreme Court of Nevada has remanded the cause for trial on the merits, there has been a final adjudication of the due process issues presented herein for review.

Under the doctrine of *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), the federal question has become final, even though there will be further proceedings in the Trial Court since, (1) no further federal questions remain to be decided at the trial level for possible further review; and (2) the federal issue is conclusive and the outcome of further proceedings is preordained since the Nevada Supreme Court has, by deciding in advance of trial, basic issues relevant to Clark County's defenses and left little to be tried below other than issues of valuation.

It is respectfully submitted that the federal questions have thus been preserved, and that there has been a final

adjudication on those issues. Indeed, a later petition for review on these issues would not be timely since the decisions creating the due process violations are and will continue to be beyond further appeal in Nevada courts.

CONCLUSION

The questions presented are of broad public interest; especially in litigation involving private parties versus counties and cities. At issue are basic concepts of justice and fair play fundamental to the right of procedural due process.

Review would serve to clarify existing doubt and mistaken assumptions in local government litigation. Such clarification would be in the public interest.

WHEREFORE, for these reasons, Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

MELVIN R. WHIPPLE
Deputy District Attorney
Clark County Courthouse
200 East Carson Avenue
Las Vegas, Nevada 89101
Counsel for Petitioner, Clark County, Nevada

GEORGE E. HOLT
District Attorney
Clark County Courthouse
Of Counsel

APPENDIX

APPENDIX A

CASE NO. A 77807

DEPT. NO. 1

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR
THE COUNTY OF CLARK

ARBY M. ALPER and RUTH ALPER,
Plaintiffs,

vs.

COUNTY OF CLARK,
Defendant.

ORDER AND JUDGMENT DISMISSING COMPLAINT AGAINST CLARK COUNTY

(Filed June 5, 1975)

Defendant Clark County's motion to amend its answer having duly come on for rehearing on May 28, 1975, the court having read and considered the points and authorities filed by the parties and heard the argument of counsel, and it appearing to the court that the failure of the plaintiffs to file a claim against the County under NRS 244.245 precluded the commencement of this action, and any order previously entered to the contrary was improvidently entered, and good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED that there is no just reason for delay and that the complaint be, and it hereby is, dismissed, and all orders previously entered inconsistent with this judgment are hereby vacated,

and that defendant recover its costs in the amount of $_____.

June 5, 1975

/s/ J. Charles Thompson
District Judge

Submitted by:

George R. Holt, District Attorney
of Clark County, Nevada

By /s/ Melvin R. Whipple
Attorney for County of Clark
200 E. Carson Ave.
Las Vegas, Nevada 89101

APPENDIX B

93 Nev., Advance Opinion 195

IN THE SUPREME COURT OF THE
STATE OF NEVADA

ARBY W. ALPER AND RUTH ALPER, APPELLANTS,

v. CLARK COUNTY, NEVADA, RESPONDENT.

No. 8412

November 17, 1977

Appeal from an order dismissing an action in inverse condemnation; Eighth Judicial District Court, Clark County; J. Charles Thompson, Judge.

Reversed and remanded for a trial on the merits.

George Rudiak Chartered, Las Vegas, for Appellants.

Robert List, Attorney General, Carson City; *George Holt*, District Attorney, and *Melvin R. Whipple*, Deputy District Attorney, Clark County, for Respondent.

Guild, Hagen & Clark, Ltd., and *Constance L. Howard*, Reno, for Amicus Curiae Nevada Taxpayers' Association.

Lionel Sawyer & Collins and *Steve Morris*, Las Vegas, for Amicus Curiae MGM Grand Hotel, Inc.

OPINION

By the Court, MOWBRAY, J.:

The principal issue presented is whether NRS 244.245[1] and NRS 244.250,[2] the Six Months' Claims Statutes, apply to a claim for damages in an inverse condemnation proceeding brought by a property owner against a county. The district judge, in dismissing the complaint, held the statutes applicable and constitutional. The appellants, Arby W. Alper and Ruth Alper, who commenced this action, have appealed.

1. Appellants acquired in May 1959 a parcel of real property 225 feet wide and 1,000 feet long, located on the south side of Flamingo Road in Clark County. This case is focused on a portion of that property, originally fronting on the south side of Flamingo Road, and now part of that road, measuring about 50 by 1,000 feet. For clarity, this portion shall be referred to as Parcel 1 and the remainder as Parcel 2.

In November 1966, appellants leased both parcels to Bonanza, a Nevada corporation, to be used as a parking

---

[1]NRS 244.245(1):

1. No person shall sue a county in any case for any demand, unless he shall first present his claim or demand to the board of county commissioners and the county auditor for allowance and approval, and if they fail or refuse to allow the same, or some part thereof, the person feeling aggrieved may sue the county.

[2]NRS 244.250:

1. All unaudited claims or accounts against any county shall be presented to the board of county commissioners within 6 months from the time such claims or accounts become due or payable.

2. No claim or account against any county shall be audited, allowed or paid by the board of county commissioners, or any other officer of the county, unless the provisions of subsection 1 are strictly complied with.

lot. The lease was for a term ending in May 1972 with an option to extend for 50 years. Prior to the execution of the lease, respondent, Clark County, requested appellants to dedicate Parcel 1 to the respondent, so that Flamingo could be widened. Appellants refused to do so. In March 1967, as a condition to securing building permits, Bonanza granted a 52-year easement over Parcel 1 to respondent. Construction was begun on Parcel 1 for widening Flamingo Road in May 1967.

Later, Bonanza filed a voluntary petition in bankruptcy in the federal court. During the bankruptcy proceedings in 1967, appellants appeared before the board of county commissioners to protest the improvements on Parcel 1. After a series of conferences, the county authorities wrote to appellants, acknowledging appellants' ownership of Parcel 1 and the limited interest conveyed by their lessee, Bonanza, and promising not to assert any prescriptive rights to the parcel.[3]

Appellants filed the present action on July 31, 1972, without having filed a claim with the county. After a pretrial conference, District Judge J. Charles Thompson dismissed the action. He determined that Parcel 1 was "taken" by respondent as a matter of law in May 1967, that NRS 244.245 did apply to actions for inverse condemnation, that such application was constitutional, and that appellants' failure to satisfy the statute barred the present action.

---

[3]The June 19, 1968, letter to Alper provided in part:

The County further recognizes that you have an underlying fee to the property and the County will not contend that because of the continued use of the property as a thoroughfare that [sic] any prescriptive right to a street easement can be obtained.

Very truly yours,

[signed] James M. Bartley
JAMES M. BARTLEY
Chief Civil Deputy

2. Appellants seek reversal on the principal ground that NRS 244.245 and 244.250, as applied to actions in inverse condemnation, result in an undue restriction on a federally created and protected right that private property shall not be taken for a public use without the payment of just compensation. The right to just compensation for private property taken for the public use is guaranteed by both the United States and the Nevada Constitutions. U.S.Const. amend. V; Nev. Const. art. 1, § 8. These provisions, as prohibitions on the state and federal governments, are self-executing. *See* Wren v. Dixon, 40 Nev. 170, 190-191, 161 P. 722, 728 (1916). The effect of this is that they give rise to a cause of action regardless of whether the Legislature has provided any statutory procedure authorizing one. As a corollary, such rights cannot be abridged or impaired by statute.

In Alexander v. State, 381 P.2d 780, 782 (Mont. 1963), the court held that compliance with a claim filing statute was not a condition precedent to an action in inverse condemnation, on the ground that such "'constitutional guaranty needs no legislative support, and is beyond legislative destruction'" (quoting McElroy v. Kansas City, 21 F. 257 (C.C.W.D.Mo. 1884)). Similarly, in Hollenbeck v. City of Seattle, 153 P. 18, 19 (Wash. 1915), the court held that, because inverse condemnation was based on a constitutional right, "no notice of the claim was essential nor could it be required."

In Willis v. Reddin, 418 F.2d 702 (9th Cir. 1969), a claim filing statute established by the California Tort Claims Act was held to violate due process as applied to a civil rights action. The United States district court had sustained a motion to dismiss a civil rights complaint against a county sheriff, on the ground that the notice and time requirements of the California Tort Claims Act

were applicable but had not been followed. The California Tort Claims Act waived in certain instances the sovereign immunities of certain public entities, and obligated the public entities to pay judgments rendered against officers and employees acting within the scope of their employment. Cal. Gov't Code § 825 (West 1966) (*amended*, West Supp. 1977). The Act also required that claims of the character asserted in that case be presented to the public entity within 100 days after the accrual of the cause and that the action be commenced within six months after the claim was acted upon. Cal. Gov't Code § 911.2 (West 1966).

In holding that the motion to dismiss should not have been sustained and that there was no necessity of compliance with § 911.2, the Ninth Circuit Court of Appeals noted as follows:

> In California[,] statutes or ordinances which condition the right to sue the sovereign upon timely filing of claims and actions are more than procedural requirements. They are elements of the plaintiff's cause of action and conditions precedent to the maintenance of the action. When the action is against the public employee rather than the public entity such statutes are given the same effect.
>
> While it may be completely appropriate for California to condition rights which grow out of local law and which are related to waivers of the sovereign immunity of the state and its public entities, California may not impair federally created rights or impose conditions upon them. Were the requirements of the Tort Claims Act nothing more than procedural limitations we would in fashioning the remedial details applicable to the federally created right involved here,

> determine whether the California courts would apply the requirements of the California Tort Claims Act. However[,] since the requirements of that Act, under the interpretations of the California courts, condition the right, we think it would be singularly inappropriate to fashion a federal procedural detail by any reference to it.

Willis v. Reddin, 418 F.2d at 704-705 (footnotes omitted).

Because § 911.2 was a condition on the right to sue, an element of the plaintiff's cause of action and a condition precedent to the maintenance of suit in California law, the Ninth Circuit Court of Appeals refused to apply that section as a bar to suit on a federally created and protected right. *See also* Reed v. Hutto, 486 F.2d 534 (8th Cir. 1973).

In the instant case it is clear that, if applied to actions of inverse condemnation, NRS 244.245 and 244.250 would be conditions on the right to sue. The Fifth Amendment to the United States Constitution states that private property shall not be taken for a public use without the payment of just compensation. A suit for inverse condemnation is an action to vindicate the right created and guaranteed by the Fifth Amendment and is applicable to the states by way of the Fourteenth Amendment. To impose a requirement of compliance with our claims statutes would allow a state to impose a precondition to sue on a federally created and protected right. The imposition of such a prerequisite to sue is an impairment of a federal right not countenanced by the ruling of the Ninth Circuit in *Willis*. Consequently, if we were to assume in the case at hand that the claims statutes were intended to cover actions for inverse condemnation, such application would, in our opinion, be unconstitutional.

Therefore, we hold that the claims statutes should not be construed to apply to actions for inverse condemnation, for to do so would deny due process of a constitutionally guaranteed right.

3. Respondent contends that, even if the claims statutes are not a bar, this action is foreclosed by the statute of limitations. The trial judge found that the taking occurred on May 8, 1967, and that the action was not commenced until July 31, 1972, over five years later. Respondent argues that NRS 11.190(5)(b), which provides a one-year limitation period for all claims against a county, bars the action. In the alternative, it is suggested that NRS 11.200, which provides a four-year period for all actions otherwise unprovided for, should bar it. *Cf.* Frustuck v. City of Fairfax, 28 Cal. Rptr. 357 (1963).

Here, however, the record shows an avoidance of the statute. The Respondent County, in its letter of June 19, 1968, promised not to assert any prescriptive rights in the property. See footnote 3, *supra*. As a result, the appellants are not now barred from proceeding in the instant case.

We reverse and remand the case for a trial on the merits.[4]

BATJER, C.J., and THOMPSON, GUNDERSON, and ZENOFF, JJ., concur.

---

[4]The Chief Justice designated Hon. David Zenoff, Justice (Retired), to sit in this case. Nev. Const. art. 6, § 19.

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF NEVADA

No. 8412

ARBY W. ALPER and RUTH ALPER,
Appellant,

vs.

CLARK COUNTY, NEVADA,
Respondent.

ORDER DENYING REHEARING

(Filed December 15, 1977)

Rehearing denied.

It is so ORDERED.

/s/ Batjer, C.J.
Batjer

/s/ Mowbray, J.
Mowbray

/s/ Gunderson, J.
Gunderson

/s/ Manoukian, J.
Manoukian

cc: Hon. J. Charles Thompson, District Judge
Hon. George E. Holt, District Attorney
Melvin R. Whipple, Deputy District Attorney
George Rudiak Chartered, Esq.
Messrs. Lionel Sawyer & Collins
Messrs. Guild, Hagen & Clark, LTD.

APPENDIX D

EXCERPT OF PETITION FOR REHEARING BEFORE THE SUPREME COURT OF THE STATE OF NEVADA

IN THE SUPREME COURT OF THE
STATE OF NEVADA

No. 8412

ARBY W. ALPER and RUTH ALPER,
Appellants,

vs.

CLARK COUNTY, NEVADA,
Respondent.

PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEVADA:

The Respondent CLARK COUNTY, NEVADA, presents this petition for a rehearing of the above cause, and, in support thereof, respectfully shows:

1. The appeal in the cause was argued before this Court on November 8, 1976.

2. On November 17, 1977, this Court rendered its decision in favor of the Appellants and against the Respondent, reversing the order of Judge J. Charles Thompson of Department No. I of the Eighth Judicial District Court.

3. The Respondent seeks a rehearing upon the following grounds:

a. That the Court has overlooked or misapprehended a material matter involved in the appeal.

b. That there exists the necessity for the settlement of important questions of fact and law, and a correction of the judgment will promote substantial justice.

ARGUMENT

The Court has overlooked or misapprehended material matters in the record involving important issues.

A. *The Eighth Judicial District Court heard arguments during a series of lengthy pre-trial conferences, had the benefit of extensive briefing and considered various pre-trial motions.*[1]

There were no evidentiary hearings and no trial of issues of fact.

The pertinent and crucially important procedural aspects of the decision of the Court below can best be described by quoting from Appellants' (Alpers') Opening Brief, at page 2,

> "STATEMENT OF FACTS AND STATEMENT OF THE CASE
>
> The District Court's decision, dismissing this action for non-compliance with NRS 244.245, came during a series of pre-trial conferences lasting several full days. (Transcripts R/A 1917-2652) During such conferences, which involved extensive legal argument on various pre-trial motions, the Court was referred to Rule 36 admissions, Rule 33 answers to interrogatories, documents produced pursuant to Rule 34, and affida-

1. Italics added for emphasis.

> vits and deposition testimony. Exhibits were marked pursuant to stipulation waiving foundation as to some and agreeing to admission of others. In this Statement of Facts and Statement of the Case, we will therefore refer to this evidentiary material as though the Court's decision had been rendered under a Rule 56(c) search of the record, although, as will be seen, in dismissing the action on the ground of non-compliance with the claim statute, the Court acted *sua sponte* without the benefit of a motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment."

Speaking from the bench, the Court below indicated that the reason for its judgment of dismissal of Alpers' complaint was a failure of jurisdiction under Rule 12, Nevada Rules of Civil Procedure. (See quote from Reporter's Transcript of proceedings found at Reply Brief of Amicus Curiae MGM Grand Hotel, Inc. at Appendix "G", page 25 of Appendices.)

Therefore, the record shows that the Eighth Judicial District Court acted under Rule 12(h)(3), Nevada Rules of Civil Procedure, declaring that Alpers' failure to comply with NRS 244.245 was a jurisdictional defect. *For want of jurisdiction Alpers' Complaint was dismissed.*

There was no evidentiary hearing on issues of fact. It is clear that where there was a failure of Alpers' action on jurisdictional grounds, there can be no decision on the merits of the case.

The only *issue for appeal* remaining was the issue of whether or not NRS 244.245 applies to an action in inverse condemnation. On appeal, Respondent was precluded from attacking the validity of the findings of fact of the Court below because their effect was nullified by dismissal of the complaint on jurisdictional grounds. Re-

spondent seeks the opportunity to present authority on that principle on Rehearing.

In effect, the Court concluded that if all Plaintiffs-Alpers' allegations were considered in their most favorable light as to Plaintiffs, the complaint must still fail for want of jurisdiction.

County of Clark had no opportunity to present its evidence on such crucial issues as the effect of County's accepting dedication of the street by a grant in easement; all the circumstances leading up to and pertaining to said grant; the question whether or not there was a "taking" of Alpers' property; the circumstances leading up to the delivery of the "County's letter of June 19, 1968" (See Opinion of the Court, page 7) which are pertinent to any interpretation of that letter, and the authority of the writer of that letter to broadly waive any and all defenses as alleged.

The findings of the Court below must be interpreted to be only for the purpose of its deliberating and ruling on the question of sufficiency of the Complaint and the judgment that it must fail on jurisdictional grounds under Rule 12.

The Court having found no jurisdiction, and having dismissed the Complaint, any findings relating thereto are of no further effect since the Court, having no jurisdiction, could not in any way rule on the merits of the case.

Appellants' statement in their Opening Brief quoted above refers to their intent to present evidentiary material on appeal. (i.e., see Appellants' Opening Brief, page 28, lines 18 to 26) Their doing so may have contributed to this Honorable Court's misapprehending of the limitations of the scope of the issue for appeal. Responding briefs of the other parties, in answering Appellants' brief, may have also contributed thereto.

If the Opinion of this Court is to stand, the references on page 6 thereof to a finding that a "taking" occurred on May 8, 1967, and that the action was not commenced until July 31, 1972, may be interpreted as the law of the case. Also, this Court's statement on page 7 that the record shows "an avoidance" of the statutes of limitation is an issue not before this Honorable Court on appeal since the only appealable issue was a judgment of failure of the action on jurisdictional grounds.

All Parties are entitled to present evidence in a trial on the merits on those issues which are obviously issues in dispute. To preclude their opportunity to do so would be a violation of due process vital to adjudication of the issues. County of Clark would be deprived of its day in Court. A substantial miscarriage of justice would result.

Your Petitioner respectfully requests a Rehearing on these points in the interest of modifying the Opinion of the Court so that an evidentiary hearing in a trial on the merits can be had on all disputed issues, on remand.

* * *

Respondent respectfully petitions this Honorable Court for a Rehearing in the interest of protecting its rights of due process on remand and in the interest of promoting justice in this action.

Respectfully submitted,

George E. Holt
District Attorney
By /s/ Melvin R. Whipple
Melvin R. Whipple
Deputy District Attorney
Clark County Courthouse
Las Vegas, Nevada 89101
Attorneys for Respondent

RECEIPT OF A COPY of the above and foregoing PETITION FOR REHEARING is hereby acknowledged this 2nd day of December, 1977.

/s/ George Rudiak/ (illegible)
George Rudiak, Esq.
302 E. Carson Ave., #610
Las Vegas, Nevada 89101
Attorney for Appellants

APPENDIX E

CASE NO. A 77807

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR
THE COUNTY OF CLARK

ARBY W. ALPER and RUTH ALPER,
Plaintiffs,

vs.

CLARK COUNTY, NEVADA,
Defendant.

NOTICE OF APPEAL

(Filed July 3, 1975)

NOTICE IS HEREBY GIVEN that ARBY W. ALPER and RUTH ALPER, Plaintiffs, hereby appeal to the Supreme Court of the State of Nevada from the *Order and Judgment Dismissing Complaint against Clark County,* Defendant, which was made and entered herein on June 5, 1975, and from the whole thereof.

DATED: July 3, 1975.

/s/ George Rudiak
George Rudiak Chartered
302 East Carson, Suite 610
Las Vegas, Nevada
Attorney for Plaintiffs

APPENDIX F

Excerpt of Judge's Decision.

CASE NO. A77807

DEPARTMENT NO. ONE

In the Eighth Judicial District Court of the State of Nevada in and for the County of Clark.

Arby W. Alper and Ruth Alper, Plaintiffs, vs. County of Clark, a political subdivision of the State of Nevada, et al., Defendants.

REPORTER'S TRANSCRIPT
OF
PROCEEDINGS

BEFORE THE HONORABLE J. CHARLES THOMPSON, DISTRICT JUDGE. *REHEARING OF DEFENDANT'S MOTION TO AMEND ANSWER TO ADD 6TH DEFENSE. REHEARING OF COURT'S PRETRIAL CONFERENCE RULINGS THAT THIS ACTION WAS COMMENCED ON JULY 31, 1972 AND REFUSAL TO RULE THAT THE AMENDED SUPPLEMENTAL COMPLAINT FILED HEREIN ON JULY 31, 1972, RELATED BACK UNDER N.R.C.P. 15(c) and 17(a) TO FILING OF THE ORIGINAL COMPLAINT ON MAY 22, 1970.*

Wednesday, May 28, 1975

* * *

THE COURT: I have a personal abhorrence to technicalities, particularly the non-claims statute.

First of all, let me comment about Judge Gang's rulings, and my review of Judge Gang's rulings. If I am convinced that Judge Gang was wrong when he denied the motion to dismiss and when he granted the motion to strike the fifth defense, it would be ludicrous for me to allow the case to go to trial and waste the time of this Court and the time and money of the litigants and attorneys, just so that the case would finally result in a final judgment which could be appealable so that the Supreme Court could reverse it.

Indeed I think that the contention of the non-claims statute is so fundamental as to actually be jurisdictional. It starts out by saying that no person shall sue a County—and that is not a just a condition precedent, I think that that is a jurisdictional requirement that one must meet before one can file a suit.

And I think it is a jurisdictional requirement that one must meet before one can file a suit, it can fit itself within Rule 12(h)3, which says whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action.

Now, the question—and I realize it seems to be coming late in these proceedings—but the question is whether or not this non-claims statute, 244.245 and 244.250, are then to be applied in an inverse condemnantion action such as this.

As I indicated, I personally abhor non-claim statutes, I think that the comment by the Justice that wrote Turner versus Staggs to the effect that the non-claims statute is a trap for the unwary is most appropriate. Particularly so in tort cases.

If you're injured in an automobile accident and you spend the first six months in a hospital, coming out to get yourself an attorney only to find that it's too late to file

your claim against the County because the six months notice of claim statute has run, it seems basically inherently unfair. But notice of claims statutes do have some salutary effect.

They do give the County notice of the fact that a claim is about to be brought. And an opportunity to, in the case of a personal injury situation, pay the claimant or in another situation to remedy the defect, whatever it might be.

There is less justification for notice of claim statutes in tort cases than in any other single set of cases that I can imagine. Particularly personal injury cases. And I think Turner versus Staggs recognized that.

There is more justification for claim statutes and their use in cases such as this, in inverse condemnation cases. If the claim is filed in an inverse condemnation case, the County knows immediately that it's going to be chargeable for the value of the property.

It can, (a) appraise it; file its own condemnation suit or wait to be sued, but decide immediately whether it's going to pay for it or—and it probably could have been done here—abandon it.

I've listened to an awful lot of argument between the attorneys on this case, and I am now firmly convinced that if the claim had been filed in this case within six months of the May day 1967 when I said that the property was taken, this case would never be here. The County would have stopped immediately and said, "All right, we'll either walk out of it and abandon it right now; we may have to pay damages for a few months for trespass, but that's nominal really; or we'll pay for it"; or probably and more likely knowing the County they would have said, "If you want building permits to do anything on this property,

you're going to have to give fee title to this property—to the strip and convey it to the County."

Certainly before the Bonanza Hotel was built, and certainly before the MGM was built, the County would have required dedication of that strip.

I also note, and I think Mr. Whipple agreed with me when I asked him, that in a tort case and a personal injury case the claims filed with the County are automatically rejected. The County has insurance covering these; the insurance could—I don't know whether it puts the arm on the Commissioners or it's just a working agreement with them, but I have never heard of a personal injury claim that has been accepted. The insurance company handles these.

And the filing of the claim with the Commission is nothing but a perfunctory tradition that you used to have to do. I think that is much more important in an inverse condemnation case.

And in this case there is no excuse for the claim not to have been filed within I believe it's four days of the date of the taking. A letter from Mr. Alper's attorney was forthcoming to I believe it was Mr. Wolf or the Bonanza No. 1 or somebody, talking about the taking of the road.

Mr. Alper was at least at that moment represented by counsel. That was the Wiener letter.

Here's a man who is represented by counsel, and is yelling and screaming about his piece of property being taken for road purposes. He certainly was not that unaware.

Also, at this point in time back in 1967 Turner had not been cited. There was not at that point in time any single decision in the United States holding the notice of claim

statutes unconstitutional. At that point in time, if there was ever an intention to bring a claim against the County for inverse condemnation, any attorney would have advised his client to file the claim against the County.

I'm not at all sure that the original intent was to bring a claim for inverse condemnation. And whether we accept the proposition that the claim for inverse condemnation could have been filed as early as May of 1967, or as late as the date that the lease was cancelled, in either event the claim statute at that point in time—the non-claim statute at that point in time was constitutional, was being used, was upheld.

And at either of those points at least the Alpers were represented by counsel. And as Mr. Morris has observed, they're not entirely ignorant of legal proceedings, although they are not attorneys.

I might also comment on 244.245 and 244.250, as they relate to Chapters 11 and 41.

They are not, as Mr. Whipple has indicated, inextricably intertwined with either of those chapters. I think they stand alone.

Chapter 11, the limitations of actions chapter, uses the point in time that the claim is denied or that it could have been denied as a reference and a starting point of the period of limitation. That doesn't necessarily mean that that particular period of limitation applies in this case.

California has essentially the same circumstance, and yet it does not apply a short period of limitation to an inverse condemnation action.

The City of San Jose is not only a good example, it is a leading case and an extremely persuasive case.

The same thing is necessarily true with Chapter 41. Chapter 41 was enacted by the state to waive sovereign immunity from tort liability; and it was enacted for that very purpose.

There never has been sovereign immunity from inverse condemnation liability. That exists today and it existed the moment our constitution was passed, and it existed if not in our constitution it existed by virtue of the Constitution of the United States of America.

I view the law in Nevada to be essentially the same as it is in California. There's a notice of claim statute.

I don't necessarily believe that the notice of claim statute has the invidious discrimination or carries with it the distinctions that are inherently the problem in Turner versus Staggs. I don't see the tremendous classification and distinction of individuals.

Indeed I doubt that there's any separate classification at all. But there may be.

If there are two separate classes, similar to the ones discussed in Turner versus Staggs, two separate groups of individuals, there may be a valid reason for discriminating in favor of the County, or against—in favor of legal entities in an inverse condemnation proceeding, or in an eminent domain proceeding, which does not exist in a tort situation.

I think that the Court in holding the statute unconstitutional in Turner versus Staggs was really realizing the fact that filing a claim with the County in a tort situation, a personal injury situation, an automobile case, a slip-and-fall case, was just a perfunctory tradition and not necessarily so in condemnation eminent domain proceedings.

This case I am convinced would not be here if it was not for the fact that the Alpers did not file their claims. Or had they filed their claims, it would not be here.

Also, commenting on the argument of estoppel, and particularly the case of Farrell versus Placer County, 145 P.2d 507, in that case which was incidentally a personal injury action, the County advised the plaintiff not to employ counsel, assured her that it would be satisfactory for her to wait until she knew the full extent of her injuries before she had to do anything; I don't view the letter of Mr. Bartley as an intention to waive or as in any way giving the impression to the Alpers that the County was waiving its rights under the non-claim statute.[1]

The Alpers were not led into a sense of false security. The Bartley letter was intended to do exactly that which it said it was doing

They were waiving any claim for a prescriptive easement. It has nothing to do with whether or not the Alpers have a claim for inverse condemnation, and whether if they're going to assert that claim they have to file a notice of claim with the County in the period limited by 244.245.

Talking about the use of non-claim statutes generally, or claim statutes generally, and the constitutional right for compensation after an eminent domain taking without the usual formalities, the Supreme Court of the State of California in City of San Jose, 525 P.2d 701, says that —and I quote—"The claims statutes provisions apply to actions both brought for nuisance and for inverse condemnation. The fact that inverse condemnation was founded directly on the California Constitution, Article I, Section 14, neither excuses plaintiffs from the compliance with the statutes nor renders the claims statutes unconstitutional."

---

1. Italics added for emphasis.

As I indicated, I do have an abhorrence to the technical arguments, particularly the non-claims statutes. But if they have a salutary effect—and I think that they do here—then I think that we should adhere to them.

I don't like the plaintiffs having to lose their case because they didn't comply with a technical defect; but by the same token, had they complied with it I really don't think we would be here today.

I think, and consistent with the San Jose case, an action for a constitutional taking can be subject to reasonable conditions precedent. 244.245 is a condition precedent.

The failure to comply with it leaves us with a jurisdictional defect that cannot be cured. I could require the County to file an amended pleading granting the County leave to assert 244.245 as an affirmative defense and file a motion for summary judgment; hear the motion for summary judgment and grant it; but that seems to me to be the long way around the horn.

I think that the defect is serious enough to be jurisdictional under Rule 12, and I am therefore going to dismiss the plaintiffs' complaint against the County.

* * *

So that I therefore find that there is no just reason to delay the entry of a final judgment in favor of the County, the entry of a final judgment in favor of the clients of Lionel, Sawyer, Collins & Wartman, and the entry of a final judgment in favor of Nathan Jacobson, on first of all the summary judgments with regards to the latter two clients, and my dismissal for lack of subject matter jurisdiction based upon 244.245 with regard to the County; so that these matters can be reviewed in their entirety during the same appeal.

I hope obviously that I have made the right decision. Just in the event that I should not, I think we should clear up a couple of miscellaneous matters.

One being the pretrial order which I have still not signed. Mr. Morris, you've been so active in these proceedings, I would like you to take Mr. Rudiak's pretrial conference order—proposed pretrial conference order, and modify it to include these proceedings on rehearing, and my other rulings; so that there be no question as to how I feel about some of these other matters in case the Supreme Court is interested in them.

Because they may pertain to this to a certain extent. Present it to me as part of this order that I'm entering here today.

APPENDIX G

Office of the
DISTRICT ATTORNEY
COUNTY OF CLARK
Las Vegas, Nevada 89101
Phone 17021 305-3131

George E. Franklin, Jr.
District Attorney

June 19, 1968

Mr. R. B. Alper
Las Vegas, Nevada

Dear Mr. Alper:

The County of Clark recognizes that that part of the northern 50 feet of the Northwest 1/4 of Section 21, Township 21 South, Range 61 East, that is owned by you and is presently being used as a thoroughfare, is being so used by virtue of what is purported to be an Agreement for its use for 52 years executed by Mr. Lawrence P. Wolf and that Vegas Bonanza, Inc., or Mr. Wolf could not give the County any more rights than such grantors actually had or would become entitled to.

The County further recognizes that you have an underlying fee to the property and the County will not contend that because of the continued use of the property as a thoroughfare that any prescriptive right to a street easement can be obtained.

Very truly yours,

/s/ James M. Bartley
James M. Bartley
Chief Civil Deputy

JMB: vmp

APPENDIX H

244.245 Condition precedent to suit against county for claim.

1. No person shall sue a county in any case for any demand, unless he shall first present his claim or demand to the board of county commissioners and the county auditor for allowance and approval, and if they fail or refuse to allow the same, or some part thereof, the person feeling aggrieved may sue the county.

2. If the party suing recover in the action more than the board allowed, or offered to allow, the board and the county auditor shall allow the amount of the judgment and costs as a just claim against the county. If the party suing shall not recover more than the board and the county auditor shall have offered to allow him, then costs shall be recovered against him by the county, and may be deducted from the demand.